

**IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

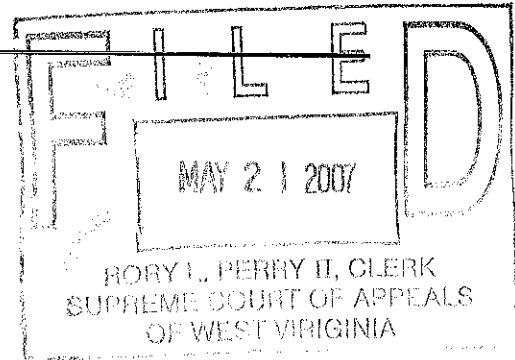
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**CHARLESTON**

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CHARLES B. ZIRKLE,

Appellant (Plaintiff Below)



VS.

No. 33307  
Civil Action No. 05-C-81

THE ELKINS ROAD PUBLIC  
SERVICE DISTRICT.

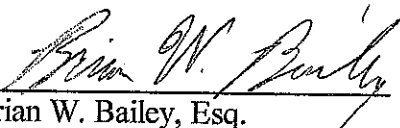
Appellee (Defendant Below)

**FROM THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA**

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**APPELLANT'S REPLY TO APPELLEE'S BRIEF**

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### Points and Authorities Relied Upon

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| 7.  | Mallamo v. City of Rivesville<br>477 S.E. 2d 525 (W.Va. 1996)                   | Page 9, 12                |
| 8.  | Hose v. Berkeley County Planning Comm'n<br>460 S.E. 2d 761 (W.Va. 1995)         | Page 9, 11, 13, 14        |
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APPELLANT'S REPLY TO APPELLEE'S BRIEF

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TO THE HONORABLE JUSTICES OF THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA

**A. Blanket Immunity Should Not be Found Under W.Va. Code §29-12A-4(c)(5),  
and Had the Legislature Intended to do so, It Could Have Precisely Removed the  
Language Allowing Political Subdivisions to Sue and to be Sued, Including from  
W.Va. Code §16-13A-3**

On appeal, Mr. Zirkle has argued that W.Va. Code §16-13A-3 grants him the authorization to sue the Elkins Road Public Service District (hereinafter "Elkins Road PSD"). He has argued that the section, which grants authorization that Public Service

Districts "may sue" or "may be sued," is the specific statute that should apply to the case at hand. Naturally, the Elkins Road PSD goes to long lengths to counter this argument, by citing the Tort Claims and Insurance Reform Act. The emphasis they place is on the language of W.Va. Code §29-12A-4(c)(5), which reads, "liability shall not be construed to exist under another section of this code merely because a responsibility is imposed upon a political subdivision or because of the general authorization that a political subdivision may sue or be sued."

The point that Mr. Zirkle seeks to reiterate here is one of statutory construction. Are we to believe that the legislature, in seeking to enact the Tort Claims and Insurance Reform Act, had it intended to do away totally with the ability to sue Public Service Districts, or for that matter, any other political subdivision, would simply enact one line at the end of §29-12A-4(c)(5) to negate entire sections of the West Virginia Code?

After all, if one looks to the general thrust of §29-12A-4(c), it is concerned with areas in which political subdivisions are actually to be found liable, and not concerned with immunity. It is rather §29-12A-4(b)(1) which grants immunity, which reads:

*Except as provided in subsection (c) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function: Provided, That this article shall not restrict the availability of mandamus, injunction, prohibition, and other extraordinary remedies.*

W.Va. Code §29-12A-4(c)(5) (emphasis added).

Subsection (c), which deals entirely with ways in which political subdivisions are to be found *liable*, is rather too lengthy to repeat ad nauseam here. The point is that this section seeks to impose liability, not to grant immunity. In fact, if one looks at the heading of §29-12A-4 itself, one finds that it reads as follows: **§29-12A-4.**

**Governmental and proprietary functions of political subdivisions; liability for damages.** *Id* (emphasis added). The appellees would have the court think that §29-12A-4(c)(5) amounts to negating any possible outlet to sue political subdivisions. This seems rather conclusive for the last line in a statute whose general thrust is one that imposes liability, not immunity.

After all, had the legislature desired to deny the ability to sue the various political subdivisions, and thought it such an all important task, surely they could have taken the time to extract the five words, which read, “may sue, may be sued” from each of the general authorizations to sue the various political subdivisions. Statutes are amended every year in the legislature, as all attorneys, doubtless including the appellees, are well aware, even in minute detail. Had it been such an all consuming task for the legislature to deny any possibility to sue the various political subdivisions, all they would have to have done would have been to go through the various general authorizations to sue and excise the minute amount of words it would have required to deny this right for all time to future plaintiffs. One might argue, as Mr. Zirkle does, that their failure to do so means they did not seek to foreclose that possibility for plaintiffs in the future.

**B. Assuming §29-12A-4(c)(5) Grants Immunity to Political Subdivisions, the Elkins Road PSD Should Still be Found Liable Because of their Outrageous Conduct Towards Mr. Zirkle Throughout His Ordeal of Attempting to Obtain Water Service**

Assuming for the sake of argument that the Court should find that §29-12A-4(c)(5) denies Mr. Zirkle the right to sue under W.Va. Code §16-13A-3, liability should still be imposed on the Elkins Road PSD because of their outrageous treatment of Mr. Zirkle throughout the course of his ordeal of dealing with the Elkins Road PSD.

To begin with, Mr. Zirkle argues that the Court should not lose sight of the facts as alleged in the complaint. Without going over them in detail for the umpteenth time, the gist of the matter is that the Elkins Road PSD, whether through its negligence, conspiring amongst its members, or frankly their utter hostility, for whatever reason,

towards Mr. Zirkle, allowed Mr. Zirkle, his longtime girlfriend, and his one month old child to effectively go nearly 15 months without water service. Mr. Zirkle would simply beg the Court to consider this circumstance: Can one imagine what its like to go without drinking water, water for baby formula for a newborn, water for a shower, etc, for even a few days? Undoubtedly, most of us take the basic necessities of life for granted until we are forced to go for a spell without them. Losing electricity is certainly a similar situation that comes to mind. If one can try to wrap their mind around the implications of going nearly 15 months with this inconvenience of lacking water service, one begins to get a sense of the basic deprivations of life which were cause by the Elkins Road PSD's hostility towards this man and his family. It is frankly not surprising the Elkins Road PSD tries to cloak them into immunity from liability in any way possible, because the facts speak for themselves. After all, as pointed out in the previous appellant brief, the West Virginia Public Service Commission has already spoken to the behavior of the appellees in this case (see Appellant Brief at P. 24).

Getting back to the legal arguments themselves, the appellees rely heavily on the provisions of W.Va. Code §29-12A-5(a)(9), in order to claim governmental immunity, which reads that:

a political subdivision is immune from liability if a loss or claim results from...(9) licensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority.

*Id.*

In essence, the appellees argue that the Acts alleged by Mr. Zirkle's complaint allege claims that only relate to the appellees licensing and permitting functions, so that the Elkins Road PDS falls under immunity granted by W.Va. Code §29-12A-5(a)(9).



Aside from their argument that §29-12A-5(a)(9) provides immunity to the appellees, end of story, appellees also make much of the fact that “the acts described in the Appellant’s Complaint concerns the acts or omissions of members or employees of the Elkins Road PSD, not the official acts of the Elkins Road PSD.” (Appellee Brief at p.15). Because of this, they claim that even if the Elkins Road PSD was not entitled to immunity from liability, it could still be held liable only if Mr. Zirkle alleged facts triggering the exceptions set forth in W.Va. Code §29-12A-4(c) for vicarious liability.

Basically, the appellees want to have it both ways when it comes to Mr. Zirkle’s claims: First, they assert that since allegations of intentional misconduct are alleged by Mr. Zirkle, political subdivisions such as the Elkins Road PSD are not liable for intentional torts of their employees. Mallamo v. Town of Rivesville, 477 S.E. 2d 525 (W.Va. 1996). Secondly, they assert that since Mr. Zirkle also asserts a claim based on the negligence of the Elkins Road PSD’s employees, the immunity under §29-12A-5(a)(9) applies “regardless of whether such claim or loss is caused by the negligent performance of acts by the political subdivision’s employees while acting in the scope of employment.” Hose v. Berkeley County Planning Comm’n, 460 S.E. 2d 761 (W.Va. 1995).

As a corollary to the above argument, appellees argue at great length that W.Va. Code §29-12A-4(b)(1) and §29-12A-5(a)(9) shields the Elkins Road PSD from liability from losses or damage regardless of whether the losses or damages were caused by intentional acts of its employees or whether it was caused by negligence of its employees acting within the scope of their employment.

1. The Elkins Road PSD Should Not be Allowed to Cloak Themselves in Governmental Immunity Under W.Va. Code §29-12A-5(a)(9) When Their Actions Amounted to Denying Mr. Zirkle and His Family the Basic Human Right of Water Service

To respond to those arguments, Mr. Zirkle would begin by reiterating once again the basic premise of West Virginia governmental tort legislation cases: “The general rule of construction in governmental tort legislation cases favors liability, not immunity. Unless the legislature has clearly provided for immunity under the circumstances, the general common-law goal of compensating injured parties for damages caused by negligent acts must prevail.” Syllabus point 2, *Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E. 2d 620 (1996); Syllabus point 2, *Smith v. Burdette*, 211 W.Va. 477, 566 S.E. 2d 614 (2002).

Looking specifically to the facts of this case, the appellees argument that their actions merely related to “licensing and permitting functions”, so as to permit them to fall underneath the provisions of W.Va. Code §29-12A-5(a)(9) is the finest sort of legal whitewashing and euphemism one would expect to run into. Placing endless delaying tactics in the way of Mr. Zirkle and his family to prevent them from obtaining water service for almost 15 months can hardly be sanitized to the point of being characterized as “licensing and permitting functions.” If anything, the actions of the Elkins Road PSD in this case cannot be characterized as falling at all under the guise of W.Va. Code §29-12A-5 immunities from liability at all. In fact, that is what Mr. Zirkle alleges.

In this case, a spade must be called a spade: the Elkins Road PSD’s actions amounted to the misuse, whether deliberate or unintentional, of governmental authority that served to make this man and his family’s life a living nightmare. “Licensing and permitting functions”, while obviously not trying to compare the magnitude of the two situations’ seriousness, but being the first analogy which comes to mind, serves to reminds one of Pentagon speak, for example, where they so cleanly sanitize the fact of civilian casualties of war to be known as “collateral damage.” While “licensing and

permitting functions” might be a nice of way of putting the matter, the effect of how these acts were carried out on the ground, and particularly the never ending roadblocks put in Mr. Zirkle’s way, can hardly be characterized in such a self-serving manner, especially when that manner conveniently serves to cloak the appellees in immunity from liability under W.Va. Code §29-12A-5(a)(9).

2. The Appellees Reliance on Hose and Principles of Vicarious Liability in this Case is Misplaced, and Mr. Zirkle Should Be Able to Recover Under the Authority of W.Va. Code §29-12A-4(c)(2)

Furthermore, the argument by the appellees that even if the Elkins Road PSD were not entitled to immunity from liability under W.Va. Code §29-12A-5(a)(9), that it could still only be held liable if Mr. Zirkle alleged facts triggering the exceptions set forth in W.Va. Code §29-12A-4(c) regarding vicarious liability, well, those are equally spurious. W.Va. Code §29-12A-4(c)(2) reads that: “Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment.” *Id.* As stated in the previous brief, as well as in the original complaint, one of the original causes of action that Mr. Zirkle cited was one for negligence. As this case has proceeded, however, Mr. Zirkle has not had an opportunity to allege facts that show negligence, as, alas, his case has been dismissed before arriving at trial before the Circuit Court of Upshur County, West Virginia.

Of course, appellees place great emphasis on the holding in Hose, which reads that to the extent Mr. Zirkle’s claims are based on negligence of the Elkins Road PSD’s employees, the immunity under W.Va. Code §29-12A-5(a)(9) applies “regardless of whether such loss or claim is caused by the negligent performance of acts by the political subdivision’s employees while acting in the scope of employment.” Syl. Pt. 4, Hose, 460 S.E. 2d 761. Mr. Zirkle has one serious problem with reliance by the appellees on this holding. As previously stated, the actions of the Elkins Road PSD in this case can hardly

be characterized as "licensing or permitting functions", as the appellees would have the court believe. Once this erroneous reliance on W.Va. Code §29-12A-5(a)(9) disappears so does the underlying rationale of the Hose holding.

Further, the people that Mr. Zirkle had to deal with in his interactions with the Elkins Road PSD were all members themselves of the Elkins Road PSD at this time. Their duties mainly consisted of bringing water service to the rural areas of the state. Mr. Zirkle certainly lives in a rural area, and, ultimately, after every delaying tactic possible was utilized, and once the West Virginia Public Service Commission was forced to intervene, the Elkins Road PSD did ultimately succeed in bringing water service to Mr. Zirkle. Despite their hostility to Mr. Zirkle, the members of the Elkins Road PSD must be said to have acted "within the scope of their employment." Also, Mr. Zirkle certainly suffered a loss of property, which is another requirement to come under the statute.

Because of the factors mentioned above, the Elkins Road PSD should also be held liable under the auspices of W.Va. Code §29-12A-4(c)(2).

3. The Elkins Road PSD Should Not Be Allowed to Benefit From Immunity Simply Because Some of the Allegations That Mr. Zirkle Asserts Amounts to Intentional Behavior on the Part of the Elkins Road PSD

The Appellees go to great lengths to cite the case of Mallamo v. Town of Rivesville, 477 S.E. 2d 525 (W.Va. 1996), to attempt to strengthen their proposition that political subdivisions should not be found vicariously liable through the intentional acts of their employees. Mallamo should be distinguished from the case at hand because it involved an alleged conspiracy to conceal facts concerning a shooting that occurred while the officers were serving an execution on the plaintiff. In essence, Mallamo amounted to a cover-up that occurred *afterwards*. In that case, perhaps the plaintiff should have sought to sue the individual police officer who committed the tortious act. In this case, clearly, the actions were ongoing while the appellees continued to deny water service to Mr. Zirkle. Furthermore, Mr. Zirkle dealt with various members of the Elkins Road PSD, not

a single member as in Mallamo. As a result, Mr. Zirkle feels as though the appellees are better situated to compensate him and his family rather than suing these members individually.

In essence, what Mr. Zirkle seeks is to have the Court prevent legal technicalities with respect to intentional torts versus negligence from shielding the Elkins Road PSD, when in effect its members acted in concert, as the Elkins Road PSD, rather than individually, to deprive this man and his family of their basic human right of water service. This issue was addressed much more at length in the original appellant's brief. (See Appellant's Brief, pp. 18-20).

**C. The Special Relationship Exception to the Public Duty Doctrine and the Inapplicability of the Hose Holding to This Case**

Finally, the appellees make much of the fact that the special relationship exception to the public duty doctrine was raised during appeal for the first time. They seek to have the Court refuse to consider the issue for the first time on appeal. Mr. Zirkle would simply counter by saying the issue was raised by the appellants in their brief in response to a question posed by the Honorable Justice Albright during Motion Day, when Mr. Zirkle's counsel appeared before the Court on February 13, 2007, when the Honorable Albright inquired as to why Judge Keadle did not consider that Mr. Zirkle had a special relationship with the Elkins Road PSD, and also as to whether their duties didn't amount to a proprietary function of government. The reason the issue was raised on appeal by Mr. Zirkle was in response to that line of questioning.

After denying that the issue should have even been addressed, nevertheless, the appellees then seek to show why the special relationship exception should not be held to apply. Predictably, they look back to the Hose case to cite this proposition:

W.Va. Code §29-12A-5(a)(9) [1986] clearly contemplates immunity for political subdivisions from tort liability for any loss or claim resulting from licensing powers or functions such as the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority, regardless of the existence of a special duty relationship.

460 S.E. 2d at 769, at Syl. Pt. 5.

Once again, the appellees look back to their all-purpose, all immunity, all the time W.Va. Code §29-12A-5(a)(9) to seek to cloak themselves in immunity, even in the case of an existing special relationship. For reasons set out above, however, the appellees should not be able to rely upon W.Va. Code §29-12A-5(a)(9), which would therefore allow Mr. Zirkle to recover in the case of a special relationship. As mentioned repeatedly, the appellees were doing much more than merely "licensing and permitting functions," as they would have the Court believe. Yes, part of what they did was grant water service to Mr. Zirkle and his family, but the Court should not lose sight of the fact that for most of his interactions with the appellees, what they did was effectively seek to *deny* water service to him and his family, for a period of nearly 15 months. This cannot be constricted, as the appellees obviously would have the Court believe, to their "licensing and permitting functions."

Furthermore, it basically cannot be disputed that a special relationship existed between Mr. Zirkle and the Elkins Road PSD. As mentioned in the previous appellant brief, all of the necessary elements of a special relationship existed between Mr. Zirkle and the Elkins Road PSD. (See Appellant Brief at pp. 22-23).

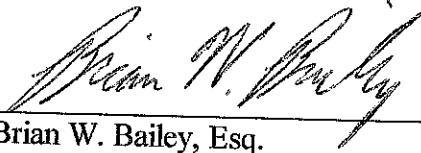
#### **D. Relief Requested**

For all of the foregoing reasons, as well as the reasons outlined in the initial appellant's brief, the Appellant, Charles B. Zirkle, prays that he be granted an ORDER

reversing the judgment of the Circuit Court of Upshur County, and that the case be remanded below so that Mr. Zirkle can proceed on to his trial, and that all other necessary relief be granted that the Honorable Court deems necessary.

Furthermore, the Appellant continues to respectfully pray for the opportunity to be heard for oral argument.

Respectfully submitted this 18<sup>th</sup> day of May, 2007.

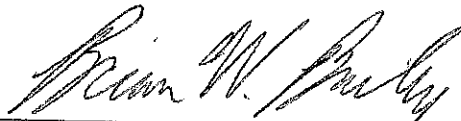
A handwritten signature in cursive script, reading "Brian W. Bailey". The signature is written in dark ink and is positioned above a horizontal line.

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### CERTIFICATE OF SERVICE

I, Brian W. Bailey, Counsel for Charles B. Zirkle, hereby certify that on this 18<sup>th</sup> day of May, 2007, I served a true copy of the foregoing "Appellant's Reply to Appellee's Brief" upon the following party below, by mailing a true copy thereof via U.S. mail, first class, postage prepaid.

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